Conn Fabricating & Engineering Company *and* Edward J. Kelley, Jr. Case 6-CA-13258

September 8, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On September 29, 1981, Administrative Law Judge Richard H. Beddow, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and limited cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Conn Fabricating & Engineering Company, New Castle, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge any reference to the discharge of Edward J. Kelley, Jr., from his personnel record or other files."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge any employee for engaging in union activities or otherwise exercising any of the rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Edward J. Kelley, Jr., immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings incurred from being terminated in March 1980, with interest.

WE WILL expunge any reference to the discharge of Edward J. Kelley, Jr., from his personnel record or other files.

CONN FABRICATING & ENGINEERING COMPANY

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge: This matter was heard in Pittsburgh, Pennsylvania, on March 19 and 20, and April 21, 22, and 23, 1981. The proceeding is based on a charge filed on March 13, 1980, by Edward J. Kelley, Jr., an individual. The General Counsel's complaint alleges that Respondent, Conn Fabricating & Engineering Company, New Castle, Pennsylvania, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by telling an employee he was laid off and would not be recalled because of

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We disavow any implication in the Administrative Law Judge's statement, "[T]he Independent Union at Respondent's facility has, in fact, not exhibited a history of unfettered independence," and other related statements, that the Union is not a legitimate labor organization because it was dominated by Respondent.

In *Behring International, Inc.* v. *N.L.R.B.*, 675 F.2d 83 (3d Cir. 1982), the court in agreement with the First Circuit found that *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), fails to take into account the General Counsel's statutory burden to prove the unfair labor practice. Although we disagree with the court's decision and its interpretation of *Wright Line*, we nonetheless find that *Behring* is factually distinguishable from the present case. Here, the Administrative Law Judge found evidence of antiunion motive and found Respondent's alleged reasons for discharging Edward J. Kelley were pretexts. Thus, the 8(a)(3) violation is established even under the standard stated in the above court decision. See, e.g., *N.L.R.B.* v. *Magnesium Casting Company, Inc.*, 668 F.2d 13, 16 (1st Cir. 1981).

Because the Administrative Law Judge found Respondent's reasons for discharging Kelley to be pretexts, there is no lawful reason for the discharge, and Member Jenkins considers *Wright Line* to be inapplicable and misleading in such circumstances.

[3] We shall modify the Administrative Law Judge's recommended Order by requiring Respondent to expunge from Edward J. Kelley's personnel record, or other files, any reference to his discharge.

The notice to employees shall be changed to correct the date of Kelley's discharge and to include the expunction remedy.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

union sympathies, by warning, and by terminating the Charging Party because of his protected concerted activities.

Briefs were filed by the General Counsel[1] and Respondent. Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Respondent engages in steel fabrication and has direct outflow in excess of $50,000. It admits that at all times material herein it is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Conn Fabricating & Engineering Independent Union (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent operates a steel fabricating plant in New Castle, Pennsylvania. Its facility is a building approximately 100 feet wide by 400 feet long, equipped with an overhead crane, several arc welding machines, an office, and work areas for the assembly and welding of steel structural members used principally in bridge construction. It generally employs between 10 and 15 welders and laborers. Supervision is provided by Shop Foreman Lee McQuiston, Vice President Converse Branscome, Jr. (Connie), and President William Branscome. Connie Branscome is president of Conn Construction Company which is engaged in building and repairing bridges. It is a principal customer of Respondent. Although his main activities are with Conn Construction, Connie Branscome spends several hours weekly on Conn Fabricating business, occupying a desk in the office, and signing payroll checks, and he is recognized by the employees as a figure of authority. William Branscome is vice president of the Conn Construction but devotes his principal attention to the business of Conn Engineering. The companies were formed about 1967. Previously, family members owned and operated similar businesses. Conn Construction operates under various union agreements, including those with the Iron Workers, Carpenters, Operators, Teamsters, and Cement Masons Unions. After some of these unions threatened to refuse to work with or handle nonunion construction materials, a union was formed at Conn Engineering. In 1973, an election was held and the Independent Union, which specifically was favored by Respondent, was selected over the Iron Workers Union as the Conn Engineering bargaining unit.

Edward J. Kelley worked for the Branscome family, including the father of William and Connie Branscome for over 25 years. Kelley is their first cousin and was asked by them to join Conn Engineering when it was formed. In 1969, he was given the position of yard foreman. Subsequently, he held a union position as head committeeman from 1977 until the position of president was established in 1979. Two other employees, Russell Umstead and Harvey Guy became members of the committee in 1977. In March 1980 after Kelley's termination at issue herein, employee Thomas Branscome, also a cousin of the owners, became president of the Union.

The parties negotiated a contract in 1973 and thereafter negotiated a series of 1-year extensions with limited addenda. Negotiations were harmonious and brief, and no contractual grievances were filed by the Union or any employee between 1974 and 1979.

In 1977 and 1978, the Union unsuccessfully approached the owners with a request for an entirely new contract. In 1979, under Kelley's leadership, the Union sought much higher wages and benefits than had been negotiated in past years. The Union hired an attorney, and Kelley personally so informed Respondent in or about late March 1979. Respondent, in turn, retained an attorney. The attorneys were present during the approximately five negotiation sessions, which were marked by arguments and profanities not characteristic of prior negotiations. The 1979 negotiations broke down and the Union went on strike for an 8-week period from June 25 to August 20, 1979. The Union picketed Respondent during this entire period.

After the start of negotiations Kelley, for the first time with Conn Engineering, was given three written warnings. They were received on June 7, 1979, in a single envelope. Two were dated June 2 and 4, respectively, and related to Kelley's alleged failure to work overtime on those dates. Neither Kelley nor Supervisor McQuiston, who had assigned the overtime, was consulted by the Branscomes before the issuance of the written warnings. The third written warning, dated June 7, was for interfering in work assignments by reportedly telling employees they did not have to obey McQuiston. Kelley denied the accusations at a meeting arranged after Kelley filed a written protest. At the meeting Kelley agreed to clarify his role as shop steward in return for Respondent's agreement to rescind the warnings. He, therefore, addressed the employees on June 14, 1979. Respondent specifically rescinded the letters dated June 2 and 4, 1979, by letter dated June 14, 1979. A week later, Kelley noticed that the June 7 warning was not specifically named in the rescission letter. He brought this to William Branscome's attention and Branscome agreed that the June 7 warning would be rescinded in writing; however, it was never done. Although William Branscome denied expressing any intention to rescind the June 7 warning, the fact that Kelley specifically spoke to all other employees about the subject of that warning leads to the inference that the speech was the *quid pro quo* for rescission of the warning.

Meanwhile, contract negotiations failed to produce an agreement, and a strike vote was taken. On June 25, 1979, the strike began.

[1] The brief of the General Counsel apparently was misdirected during transmittal. Upon inquiry by the Division of Judges, a copy of a brief dated June 9, 1981, was forwarded and received on August 5, 1981. The Charging Party and Respondent received their copies on June 11 and 12, 1981, respectively.

On July 5, 1979, Kelley on behalf of the Union, signed and filed a petition to amend the certification in an apparent effort to strengthen the Union by affiliation. Respondent retained an attorney to oppose Kelley's efforts. On August 13, Kelley testified on behalf of the Union at a hearing concerning the petition. The petition was dismissed on September 18, 1979.

During the course of the strike all employees engaged in peaceful picketing. Approximately five formal meetings occurred with an exchange of proposals and counterproposals. Both Branscomes were present during most of these meetings.[2]

On a few occasions when Kelley was not on the picket line, William Branscome spoke with Umstead and Guy, the other committeemen involved in the negotiations. After learning of this, Kelley confronted William Branscome and demanded, as president, to be present at any and all negotiations. Branscome responded that he would talk to anyone he wanted to.

As the strike continued into its seventh week, Guy and Umstead began to disagree with Kelley. Guy had several telephone contacts with William Branscome. Guy told him that some of the men wanted to go back to work, and arranged a meeting with himself, Branscome, and Umstead.

Guy told Branscome that Kelley had the employees all fired up and that he was like a war monger at union meetings.[3]

On August 20, 1979, Kelley, Umstead, and Guy went to the plant and told William Branscome that the employees were willing to return to work. General agreement on a contract was reached; however, nothing was signed. Subsequently, a written contract was prepared but again was not signed by Kelley because of some continuing disagreement on the terms of two subsidiary issues. (No contract was formally signed until after Kelley's termination.)

After the employees' return to work, Kelley on August 29, 1979, received a written warning, citing a plant rule for removing a shovel and a wooden keg from the plant without permission. At quitting time on August 28, William Branscome saw Kelley openly carrying the items out the gate to the parking lot. He was on his way to a meeting and did not question Kelley at that time. He asked McQuiston and his brother the next day[4] if Kelley had their permission to do so and then prepared the warning, without questioning Kelley. Although the keg was similar to those in which Respondent received welding rods, it belonged to Kelley. Kelley returned the borrowed shovel the following morning. In the past it was not an uncommon practice for employees to borrow Respondent's equipment, with or without Respondent's permission, and they were not disciplined for such action.

In early September 1979, Kelley complained to McQuiston, William Branscome, and Converse Branscome, Jr., that seniority should apply in the assignment of overtime. Respondent's reply was that they would work whomever they wanted to.

On September 10, 1979, Respondent obtained a judgment against Kelley to recover the remainder owed by Kelley on a loan from Respondent. The loan had been executed approximately 3 years earlier for a daughter's wedding expenses and the $25 loan payment was deducted from each paycheck. During the course of the strike, no checks were being received by employees and, accordingly, no payments were being made by Kelley pursuant to deductions from his checks. Subsequent to the strike and before September 10, 1979, Respondent resumed the $25 deduction from Kelley's checks. Respondent did not orally or in writing ask Kelley to make the payment not paid during the strike and Respondent did not warn Kelley that it would take legal action against him if he did not repay the money.

On September 20, 1979, Kelley filed a formal written grievance (the first on a preprinted form)[5] on behalf of employee DeRekos in connection with a change in Respondent's personal day policy.

On October 9, 1979, a representation petition was filed by Shopmen's Local Union No. 527 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, to represent the employees then represented by the Independent Union. Although he was not named on the petition, Kelley had contacted the International, requesting them to represent the employees, and he had requested employees to sign International membership cards. A letter accompanying the petition was mailed by Acting Regional Director Edward A. Grupp on October 10, 1979, and received by Respondent on October 11, 1979. Upon receipt of the letter and petition on October 11, 1979, Connie Branscome approached Kelley and, as described by Kelley, said:

> What the f— is wrong with me, what am I trying to do to him. I sicked them f—— Iron Workers on him, I got the god damn Iron Workers Union on him now, what am I trying to do, don't you know you can be rubbed out and you know damn well I can get you rubbed out . . . . Well, Mr. Branscome, after his accusations—the fact that I sicked the Union on him, told me that my name was on the petition.

Branscome had jumped to the conclusion that Edward J. Kelley had signed when in fact it was Edward A. Grupp. The Board's letter did not name Kelley but did show that a copy was being sent to the Iron Workers Union and to the Independent Union, at Kelley's home address.

On October 12, 1979, Kelley filed unfair labor practice charges with the National Labor Relations Board over this incident. The charge was settled and a notice was posted in which Respondent stated that it would not engage in certain proscribed activities. Also on October

[2] Although denied by Connie Branscome, I find Kelley's testimony that the meetings were marked by Connie Branscome's use of profanities to be credible and supported by Umstead's testimony.

[3] Although Branscome first denied hearing this information, he then amended his testimony to reflect that he "did not recall him ever saying that to me."

[4] Connie Branscome testified that it was later the same day.

[5] An earlier written protest was filed by Kelley on June 13, 1979, in regard to the June 1979 written warnings. An informal typewritten grievance appears to have been filed in 1973.

12, 1979, unfair labor practice charges were filed against Respondent by employee Charles Cline concerning his employment with Respondent.

On October 15, 1979, Kelley attempted to give Connie Branscome a written grievance on behalf of Cline; however, Branscome stated, "I don't want the god damn thing, to forget about it, I don't want to hear anything about Charlie Cline. He went to the god damn Board and spilled his guts."

Also in the fall of 1979, employee William Strawchecker sought Kelley's aid in connection with receiving his pension funds from Respondent. On behalf of Strawchecker, Kelley went to the Labor Management Services Administration of the Department of Labor and then submitted Labor Management's proposal to resolve the dispute with Respondent. Respondent proposed to give Strawchecker his money from the funds of the other employees. Kelley strongly protested this proposal. Guy and Umstead, without Kelley's knowledge or consent, requested in writing that the pension fund be paid according to Respondent's plan. Upon learning of Guy and Umstead's actions, Kelley severely castigated them.

On October 22, 1979, Guy and Umstead resigned their committee positions because of conflicts with Kelley. During the strike, Kelley had called Guy a "gutless son-of-a-bitch." Guy and Umstead also opposed Kelley on the pension fund issue, as well as on the issue as to whether the contract should be signed. (Kelley did not believe Respondent had drafted the final contract in accordance with what the parties had orally agreed.) They also disagreed with Kelley's AC and RC petition attempts.

On November 2, 1979, Kelley filed a grievance on behalf of employee Michael Ingram in connection with Ingram's termination. On November 6, 1979, Kelley filed a grievance protesting the performance of unit work by Superintendent McQuiston at a time when two employees were laid off. This latter grievance was appealed by Kelley to a second step on November 17, 1979.

On December 5, 1979, Kelley was demoted from a group leader position and his wages were correspondingly reduced. On December 18, 1979, he filed a grievance over the demotion and filed an unfair labor practice charge on December 29, 1979. The Regional Office dismissed the charge on February 29, 1980. As with the prior unfair labor practice charges, petitions, and negotiations, Respondent again hired an attorney to represent it in the proceedings initiated by Kelley.

On December 17, 1979, Kelley testified on behalf of former employee Michael Ingram against Respondent at an unemployment compensation hearing. Ingram won his appeal over Respondent's opposition and the unemployment compensation decision was mailed to Respondent on December 29, 1979.

On January 24, 1980, Respondent laid off employee Ernie DeRekos. Kelley and committeeman Walter Jenkins then spoke with Connie Branscome. Kelley said that Respondent should have laid off employee Keith Smith because of DeRekos' seniority. Branscome's reply, corroborated by Jenkins, was to the effect that he would lay off who he wanted to lay off, that it was his "f——g" company and not Kelley's, that it is none of Kelley's "god damn" business, who he hires, what they are hired for, who he keeps, and who he lays off. Kelley responded that it was his business as steward and union president. They argued some more, and Branscome got excited and red in the face. He cursed at Kelley in a high voice and Kelley told him "Connie, the stature that you have in this business, the position you have with the company, the education that you've had, and the way you talk now, you're absolutely ignorant." Branscome replied that Kelley was "f——" sick, to get the "f——" out of his office, and that it was his Company to run his way. Branscome left his desk and approached Kelley at this time. Kelley told him not to lay a hand on him. Branscome ordered them out of the office and both left. Earlier in the conversation, Jenkins asked if there were going to be any more layoffs and Branscome said no. The following day Connie Branscome filed a defamation suit against Kelley and laid off Keith Smith and Kelley's son. The suit was not pursued further. DeRekos was not recalled.

Approximately 2 weeks later, Smith went to Respondent's facility to speak with William Branscome about the possibility of recall. Branscome told him that Kelley was responsible for his layoff, that Smith had stabbed Respondent in the back by telling Kelley that Smith was hired as a laborer (Respondent lays off according to seniority by classification and Respondent had attempted to justify DeRekos' layoff by saying that Smith was a machinist), that Smith had to pick his side, and that if he sided with the Union, Branscome could not assure him whether he would be recalled. Smith stated his desire to be neutral. He was never recalled.

In early February 1980, Kelley protested to McQuiston about Respondent's use of Conn Construction employees to perform unit work while employees of Respondent Conn Engineering were laid off. McQuiston sarcastically replied that in the future Respondent would attempt to fulfill all of Kelley's wishes.

On March 6, 1980, Kelley received an envelope from Connie Branscome, Jr., which contained three written warnings relating to incidents which occurred on February 25 and 29 and March 3, 1980. The third letter included a notice of discharge. Kelley was not asked for his version of any of these events.

The February 25 warning cited three separate plant rule violations relating to Kelley's use of an overhead crane. It stated, in part, "You knowingly proceeded to hook onto and carry two steel horses by use of the overhead cranes directly over the head of Mr. Harvey Guy without prior warning to him in willful and reckless disregard for his safety." The charge was based on an apparent complaint by Guy to William Branscome made on March 4 after Guy had informed Branscome of the March 3 incident, discussed below.

The February 29 warning refers to rule violations based on a threat by Kelley against employee Thomas Branscome, regarding the opening and closing of an outside door. Thomas Branscome mentioned the incident to McQuiston on Monday, March 3, before work started. William Branscome asked Thomas Branscome about it on March 5. Thomas Branscome said it was a minor

thing to him and William or Connie Branscome did not indicate why they were concerned or how they found out about it.

The March 3 warning relates to four rule violations for threats made by Kelley to Guy regarding conflicts over the use of a welding machine and the changing of control settings. After the occurrence, Guy told McQuiston about it. At this time McQuiston spoke to Kelley and told him he could not take things in his own hands and go around the shop threatening people, that he should see McQuiston, and that McQuiston would take care of it. In response to numerous questions, McQuiston denied telling William or Connie Branscome about any of these incidents. At the hearing, McQuiston reluctantly admitted that he thought he had been asked by probably both Branscomes and had discussed at least the welding machine incident. On March 4, 1980, Guy asked Connie Branscome if he had heard of the welding machine incident and then Guy personally told William Branscome about that incident, and then the overhead crane incident on February 5. Branscome allegedly obtained supporting information from Umstead[6] regarding both the crane and welding machine incidents. He also contacted a state inspector who apparently had an opportunity to observe the latter occurrence. The inspector was essentially noncommittal to Branscome about what he may have seen and he was not called as a witness.

Kelley's recollection of the overhead crane incident was that he transported the two horses from one part of the facility for his use at another part of the facility in a safe manner with the aid of another employee, John Kwolec, who held on to the horses. Kwolec corroborated Kelley's testimony that the horses were moved in a manner that did not threaten Guy's safety.

Kelley's recollection of this open door incident was that on three occasions he closed an outside door to prevent a cold draft that tended to interfere with his operation of an automatic burning machine. He then noticed that Thomas Branscome, who was working some 60 feet further away from the door than Kelley, was opening it and Kelley told him if he opened the door again he would "knock you on your ass."

Kelley's testimony regarding the welding machine incident was that he had been using the machine for 5 days or more. Major changes in the amperage setting were being made without his knowledge which he felt could affect the quality and safety of his work. He told McQuiston of his problem and that he suspected Umstead or Guy. These events were corroborated by witness Walter Jenkins. On March 3 Kelley turned on the machine and later in the morning he put a rod into a holder and struck the material to be welded. Sparks flew (more extensively than normal) and the rod began to distintegrate rapidly, startling Kelley. He, realizing that the amperage was too high, accused Umstead and Guy of "f——" with the AC/DC machine. Guy and Umstead looked and smiled at one another. Guy then told Kelly that he was using the machine. An argument ensured in which Kelley threatened to beat up Guy. Guy suggested they go to Respondent's office, but Kelley declined. Subsequently, Guy and Umstead admitted that they attached a second set of leads over Kelley's and had turned up the amperage without informing Kelley.

Kelley, upon being discharged, was given two checks. The first dated March 5, 1980 (Wednesday), was signed by Connie Branscome[7] and the second dated March 6, 1980, was signed by William Branscome. The latter testified that he made the decision to fire Kelley on Wednesday afternoon, March 5, assertedly before he spoke with his brother Connie on Thursday morning. The three warning letters and the discharge were contemporaneously prepared, started on March 5, and finished on March 6.

A day or two after Kelley's discharge Connie Branscome came out to the area where Walter Jenkins was working and, in an apparent reference to Kelley, told Jenkins that "now that we got rid of our stumbling block, we can get some work done."

After Kelley's discharge, employees Guy and Umstead individually called William Branscome and "confessed" to having taken eight 4 by 8 of plywood. Guy confessed for the asserted reason that he felt Kelley would try to get back at him, and both Guy and Umstead gave the reason that they would prefer Branscome hearing about it from them instead of someone else. Umstead also "believed" he told Branscome that Kelley acted as their lookout. On March 13, 1980, both Guy and Umstead received written warnings that any such further violations of plant rules would result in disciplinary action.

Kelley filed a grievance regarding his discharge and by letter dated March 27, 1980, William Branscome rejected and denied the claim.

IV. DISCUSSION

The issues in this case are whether William Branscome unlawfully threatened Smith after his layoff and whether Kelley was discharge because of his union and protected concerted activities. Respondent denies making any unlawful statements or committing any unfair labor practices. It affirmatively contends that the warnings to Kelley and his termination were for just cause unmotivated by Kelley's participation in protected activities, were consistent with past practices, and were therefore lawful.

Upon a review of the briefs and the entire record, I am persuaded that the General Counsel has established both violations by a preponderance of the evidence.

As noted by the General Counsel, the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), has set forth a uniform test method of analysis to be applied in 8(a)(3) cases involving motive. This test involves a two-part analysis. Initially, the General Counsel

[6] Umstead testified in April 1981 that he had not discussed these incidents with management prior to Kelley's discharge but did so afterwards, about March 14, 1980. At the continued hearing in March 1981, he recalled being asked for such information on March 4, 1980, prior to Kelley's discharge.

[7] When Connie Branscome was asked about his roll in preparing Kelley's payoff checks, his answer was: "I don't recall. I don't know. I can't say." When further asked if the checks were the type employees usually receive on payday (they were not), his response was: "I can't tell. I don't remember." "I don't know. I don't do the bookkeeping. I'm an engineer. I just sign it."

must establish a *prima facie* case that protected conduct was "a motivating factor" in the employer's decision. The burden then shifts to the employer to demonstrate, as an affirmative defense, that the decision would have been the same in the absence of protected conduct. If the employer fails to establish the affirmative defense, the General Counsel will prevail, regardless of the quantum of unlawful motivation involved. Moreover, if there is a mixed motive where the asserted defense was relied on in part but the employer does not show that such reason alone would have justified the employer's action, a violation of the Act will be found.

In resolving conflicts in credibility, I have credited the testimony of Kelley, Jenkins, Kwolec, and Smith over Respondent's witnesses. While Kelley had obvious interest in the outcome of the proceeding, he openly admitted to facts detrimental to his cause and reputation and appeared to be forthright in his testimony. In contrast, Respondent's witness Connie Branscome in particular displayed a reluctance to give responsive answers to questions and he displayed a flippant attitude which conveyed a general impression of disdain for both Kelley and these proceedings. Also, the testimony given by Guy and Umstead sometimes seemed to be inconsistent with that of Branscome and each other. Their testimony was also unnecessarily vague or qualified. Also, the testimony given by William Branscome, Connie Branscome, and McQuiston regarding how management learned of the welding machine incident and other background incidents was evasive and inconsistent.

Turning to the alleged independent violation of Section 8(a)(1), William Branscome admitted that he had a conversation with Smith in February 1980 regarding the possibility of Smith's recall. Although he denied the following statements and implied that Smith may have misunderstood him, I find that Smith, who currently has an employer other than Respondent, was essentially a disinterested witness and I credit his testimony that Branscome told him that Kelley was responsible for Smith's layoff, that Smith had to decide between the Company and the Union, that Smith could not remain neutral as he wished, and that if Smith sided with the Union he could not be assured whether or not he would be recalled. This statement constitutes a threat of loss of employee recall for engaging in union support and I conclude that Respondent has violated Section 8(a)(1) as alleged.

Kelley's discharge on March 6, 1980, took place within a framework of an escalating series of conflicts between Kelley and Respondent which began 1 year earlier when Kelley opened contract negotiations with demands for an entirely new contract and for greatly increased benefits. The General Counsel contends that Respondent had animus against Kelley because of his activities on behalf of the Union. First, as a matter of background, it is recognized that the Independent Union at Respondent's facility has, in fact, not exhibited a history of unfettered independence. To the contrary, it appears that the Independent Union was formed with the consent, if not the encouragement, of Respondent and that Respondent, in the 1973 election, specifically supported the nonaffiliated Independent Union over the nationally affiliated Iron Workers Union. For several years the Independent sought little by way of change, until the Union, under Kelley's leadership, became more militant and sought substantial contractual changes. That Respondent resented the Independent's new militance was directly established by Connie Branscome's precipitous identification of Kelley as the signer of the Iron Worker's representation petition. His other profane outbursts and threats made his hostility to Kelley clear. Respondent's hostility was also shown by the Branscomes' intemperate and profane outburst aimed at Kelley in and out of negotiations and was further established by William Branscome's threat to Smith.

The General Counsel contends that the series of disciplinary actions taken against Kelley that culminating in his discharge were pretextual, were not caused by the reasons stated by Respondent, and are further evidence of Respondent's animus. These actions include the three warnings given to Kelley in one envelope, on June 7, 1979, after negotiations had started. William Branscome acted precipitously, without consulting either Shop Supervisor McQuiston or Kelley to learn the facts that would obviously have cleared Kelley of the first and second charges. Moreover, although Respondent agreed to rescind the work assignment warnings along with the others if Kelley addressed the employees, Respondent reneged on that agreement. Respondent had given written warnings only sporadically in the past. Yet, with this series of actions, Respondent began issuing such warnings for all "questionable" actions engaged in by Kelley. I find under the circumstances that these actions were not taken by Respondent for the reasons stated. Based on the fact that Respondent seized upon pretexts to justify discipline and to conceal its true reasons, it may be inferred that these actions were motivated by animus against Kelley.

During the course of the strike Respondent took advantage of opportunities to engage in contacts with committeemen Guy and Umstead outside of normal negotiating sessions and outside of the presence of the union attorney and Kelley, who was head of the union committee. The fact that Respondent bypassed Kelley to deal separately with the nonmilitant members of the committee is further indicative of animus against Kelley.

After the strike Kelley received a written warning relating to his borrowing a shovel and a keg. Again, this warning was given despite the fact that Kelley had returned the shovel and owned the keg. The signing of a written warning under these circumstances was given precipitously and was inconsistent with Respondent's past practice. Although Respondent attempted to equate its warning to Kelley to other asserted terminations for theft and to the warnings given to Guy and Umstead, the offenses were hardly parallel. Again, the inference is warranted that the action was not caused by misconduct by Kelley, but that Respondent seized upon Kelley's borrowing of the shovel out of its hostility to him in the aftermath of the strike.

Again, and in view of the circumstances, I find Respondent's action in obtaining a judgment on Kelley's loan, without requesting payment, while at the same time continuing to make normal payroll deductions after the

strike was over, to be indicative of animus. Although Respondent may have had the right to seek judgment without further notice, its actions in going forward without giving Kelley fair notice of his obligation to make payments during the course of the strike leads to the inference of animus.

During the fall of 1979 and continuing into the early part of 1980, a climate was established at Respondent's facility in which Kelley continued his activist conduct on behalf of the Union while Respondent displayed unveiled hostility to Kelley in reprisal. As noted above, this hostility further was exemplified by Respondent's retaliatory demotion of Kelley from his position as group leader and by the circumstances of the 8(a)(1) violation involving employee Smith. Finally, three events occurred involving alleged misconduct by Kelley which resulted in his firing.

Under the circumstances, I conclude that the reasons given by Respondent are pretextual and that the real reason for Kelley's discharge was Respondent's antiunion animus. Respondent did not attempt to conduct a fair investigation of Kelley's roll in the three incidents. To the contrary, it accepted the reports by Guy and Umstead, both of whom were known to be antagonists of Kelley, without getting Kelley's side of the story. In fact, it appears that Respondent solicited the charges relating to the overhead crane and open door incidents in order to bolster its justification for discharge relative to the welding machine incident. The midweek discharge and the preparation of two termination checks show that Kelley's discharge was rushed and that no meaningful attempt was made to fully investigate or fairly evaluate the possibility that the reports were inaccurate or that the incidents could have been caused by the misconduct of other employees.

Accordingly, and in light of the 8(a)(1) violation and the numerous and continuous indications of antiunion animus, I find substantial support for the General Counsel's contentions. Compare *N.L.R.B.* v. *M & B Contracting Corporation*, 653 F.2d 245 (1981).

I conclude that the General Counsel has made the requisite showing that Kelley's protected conduct was a motivating factor in Respondent's decision to discharge him. I further conclude that Respondent has not persuasively shown that Kelley would have been discharged even if his protected conduct had not occurred. Accordingly, the General Counsel has met his overall burden of proof consistent with the criteria set forth in *Wright Line, supra*, and *Castle Instant Maintenance Maid, Inc.*, 256 NLRB 130 (1981), and I conclude that Respondent's discharge of Kelley on March 6, 1980, violated Section 8(a)(1) and (3) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Edward J. Kelley, Jr., on March 6, 1980, Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act.

4. By making statements implying that the layoff and possible recall of employee Keith Smith were related to the employee's feelings toward the Union, Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer Edward J. Kelley, Jr., immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed. It is also recommended that Respondent be ordered to make Edward J. Kelley, Jr., whole for the losses which he suffered as a result of his termination in accordance with the method set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed by the Board in *Florida Steel Corporation*, 231 NLRB 651 (1977).

Based on the entire record, the findings of fact, discussion, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Conn Fabricating & Engineering Company, New Castle, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging any employees or otherwise discriminating against them in retaliation for engaging in union activities or other protected concerted activities.

(b) Discouraging employees' union activity or membership by implying reprisals with respect to their hire or tenure of employment, including conditions of reemployment, because of their union sympathies.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action in order to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to Edward J. Kelley, Jr., and make him whole for the losses he incurred as a result of the discrimination against him in the manner specified in the section of Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records, reports, and other documents necessary to ana-

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

lyze the amount of backpay due under the terms of this Order

(c) Post at its New Castle, Pennsylvania, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."